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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Southwestern Bell Telephone Company,)
Pacific Bell, and Nevada Bell Petition for) CC Docket No. 98-91
Relief from Regulation Pursuant to Section 706)
of the Telecommunications Act of 1996 and)
47 U.S.C. § 160 for ADSL Infrastructure and)
Service)

**OPPOSITION OF
KMC TELECOM INC.**

KMC Telecom Inc. ("KMC"), by undersigned counsel, hereby submits its Opposition to the Petition filed by Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (collectively, the "SBC LECs") in the above-captioned proceeding. KMC opposes this Petition because it is internally inconsistent, inconsistent with the competitive dynamics of the marketplace today, and inconsistent with the Communications Act of 1934 ("Act"), as amended by the Telecommunications Act of 1996 ("1996 Act").

I. THE PETITION CONTRADICTS ITSELF IN ASSESSING THE COMPETITIVE LANDSCAPE OF ADSL SERVICES.

As the proponents of their requests for regulatory relief and forbearance, the SBC LECs carry the burden of persuading the Commission to rule favorably on their Petition. Yet their Petition contains patently inconsistent arguments regarding the presence of competition in the market for ADSL services. In essence, they seek to characterize the market in whatever manner serves the argument they are making at the moment. On the one hand, when the SBC LECs want to claim that regulatory relief is needed to promote the availability of ADSL technologies, they assert that this

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relief will "provide investment incentives for the deployment of advanced telecommunications capability" ¹ On the other hand, when they want to argue that a grant of the Petition would not have anti-competitive implications, they claim that consumers are enjoying "an increasing selection of new services and technologies that can provide high-speed data services" that are "at least equal to the SBC LECs' ADSL offering in terms of speed and price." ²

In either case, the Commission must question the logic employed by the SBC LECs. If the former statement regarding the lack of ADSL deployment is accurate, then the Commission must ask whether regulatory relief would in fact lead to the SBC LECs exercising unfettered monopoly control over the only ADSL-capable networks in their respective regions. Yet if the latter statement regarding the presence of competitors in SBC markets is true, the Commission must question whether regulatory relief is necessary, since it would appear that choices in ADSL service offerings are already readily available for consumers.

The fundamental flaw in the logic employed by the SBC LECs arises from their misunderstanding of the presence of competitors in the market for ADSL services. Although there are several competitive local exchange carriers ("CLECs") present in the ADSL retail markets, the SBC LECs consistently misrepresent the strength of these competitors. For example, they announce that Covad's DSL offerings "cover over 700,000 homes and businesses" in California's Bay Area without ever indicating how many homes and businesses Covad has actually been able to win away

¹ Petition, at 4.

² *Id.*, at 10.

from Pacific Bell to its services.³ They further cite the presence of UUNet and Rhythms NetConnections in California, NetSpeed in Texas, and "On the Net" in Missouri without providing any market penetration numbers at all. The SBC LECs provide no reason to believe that the presence of these competitors in their markets will provide sufficient competitive pressure if ADSL services are deregulated and exempted from the various pro-competitive provisions of the 1996 Act.

More importantly, the SBC LECs are careful not to mention the extent to which these CLECs rely upon SBC LEC facilities to provide ADSL alternatives to consumers. Although competitors may provide nascent retail competition in a few states as mentioned in the Petition, it is also likely that these CLECs rely upon the availability of unbundled ADSL loops from the SBC LECs to reach most, if not all, of their customers. Granting the SBC LECs' Petition under such circumstances would be tantamount to "freezing" competitive entry into the ADSL services market, as only the SBC LECs and those few competitors who started offering ADSL early enough would have access to the facilities necessary to provide such services to the majority of consumers (assuming, of course, that those CLECs who had already obtained unbundled access to ADSL loops could continue to do so). Rather than promoting the deployment of ADSL technologies for all consumers, granting the SBC LECs' Petition would in the first instance ensure that ADSL could be provided by only the SBC LECs.

³ *Id.* at 15.

II. REGULATION OF SBC'S ADSL INFRASTRUCTURE PURSUANT TO SECTION 251(c)(3) REMAINS NECESSARY TO ENSURE THAT COMPETITORS HAVE NONDISCRIMINATORY ACCESS TO THAT INFRASTRUCTURE.

The SBC LECs claim they will continue to provide unbundled ADSL-capable loops to competitors, apparently conceding that CLECs will still need access to the incumbent's network to provide competitive ADSL service offerings. Yet they also ask the Commission to exempt them from section 251(c)(3) of the Act – the very section that requires them to unbundle network elements.⁴ The discriminatory intent underlying this request for an exemption becomes apparent when one examines how the SBC LECs propose to ensure that competitors would continue to have access to such loops on a "nondiscriminatory basis."⁵ Once relieved of the statutory nondiscrimination requirement, they would water down the definition of nondiscrimination to the extent that such a protection would be largely meaningless.

According to the SBC LECs, nondiscriminatory provisioning will be ensured through three tests involving facility availability, loop qualification, and spectrum management. They further assert that "nondiscriminatory treatment results from those checks."⁶ In reality, all these tests will determine is whether the unbundled loop provisioned by the SBC LECs can support ADSL.⁷ They will not ensure that the loops are the same quality as those the SBC LECs use in providing ADSL services for their retail customers. These tests will not require the SBC LECs to provision the unbundled loops in the same manner and time frame as they provide these loops for themselves, as

⁴ See 47 U.S.C. § 251(c)(3) (1996).

⁵ Petition, at 17.

⁶ *Id.* at 18-19.

⁷ See *id.* at 19.

section 251(c)(3) requires.⁸ These tests will not ensure that the competitors receive maintenance and repair support in the same manner and time frame as the SBC LECs provide for themselves, as section 251(c)(3) also requires. These tests will not ensure that the prices of the ADSL-capable loops provided by the SBC LECs are fair and nondiscriminatory. In sum, they fall woefully short of assuring nondiscriminatory access to unbundled loop facilities.

Moreover, there is no guarantee that these tests will be monitored for integrity, accuracy, or reliability. Absent constant and effective monitoring by some independent third party or regulator, the SBC LECs have every incentive to skew the test results to indicate that no facility is available for use by a competitor in a requested service area, and then miraculously, on the basis of "newly-discovered facts" or "subsequent deployment," find a way to provide ADSL service themselves in that area. Or, the SBC LECs may simply prove incompetent in conducting these tests for requesting carriers, given that they have provided no demonstration or data showing that they can perform any of these tests with consistently reliable results. Finally, the SBC LECs themselves admit that the third test – the spectrum management check – is "projected" to be in place by mid-1999, meaning that only two of the three tests that are supposed to ensure nondiscriminatory access would be in place if the Commission were to grant the Petition. The Commission should not grant the SBC LECs' Petition on the basis of a test that has not yet even been developed and implemented by the petitioners.

⁸ The SBC LECs' vague promise to check and qualify loops on a "first asked, first qualified" basis is not the same as a specific promise and performance interval on a "first asked, first provisioned" basis. *See id.* at 20.

Contrary to the myopic view of the SBC LECs, nondiscriminatory access must go far beyond the simple capabilities of the unbundled element provided. Indeed, in promising to offer collocation under section 251(c)(6) of the Act for other carriers' ADSL equipment,⁹ the SBC LECs appear to acknowledge that their control over ADSL loop facilities will be no different than their control of any other bottleneck element in their networks. It is inconsistent to believe that the collocation provisions of section 251(c)(6) must continue to be applied while arguing that the unbundling provisions of section 251(c)(3) will be unnecessary or undesirable. Both of these safeguards will remain essential going forward in ensuring that competitors have the opportunity to compete on a level playing field with the SBC LECs for customers seeking ADSL services.

III. THE SBC LECs' PETITION IS PREMISED UPON FUNDAMENTAL MISINTERPRETATIONS OF THE COMMUNICATIONS ACT, AS AMENDED BY THE TELECOMMUNICATIONS ACT.

In addition to their erroneous conclusions about the lack of any need for section 251(c)(3) protections in the context of ADSL loop facilities, the SBC LECs base their Petition upon misinterpretations of several other provisions of the Act, as amended by the 1996 Act. Specifically, their analysis is contrary to the Eight Circuit's interpretation of section 252(i) of the Act, and they also misapply the "public interest" standards contained in section 10 of the Act and section 706 of the 1996 Act.

The SBC LECs argue that this Commission should forbear from enforcing section 252(i) to the extent that it might apply to any agreement that allows ADSL services to be sold at a wholesale

⁹ 47 U.S.C. § 251(c)(6) (1996).

discount or permits ADSL loop facilities to be unbundled.¹⁰ As a preliminary matter, this is plainly inconsistent with the statutory concept that these contracts are creatures of negotiation, with the SBC LECs having voluntarily agreed to unbundle such loop facilities in accordance with section 251(c)(3).¹¹ The SBC LECs negotiated these agreements knowing that Section 252(i) would apply, and the Commission should not grant regulatory relief that allows them to escape the consequences of their own voluntary acts.

Furthermore, the SBC LECs' request that the Commission forbear from enforcing section 252(i) with respect to ADSL loops is inconsistent with the currently prevailing interpretation of that section as provided by the U.S. Court of Appeals for the Eighth Circuit.¹² While KMC does not concur with the Eighth Circuit's "all or nothing" interpretation of section 252(i), all parties are bound to adhere to the holding of the highest court to rule on this issue to date. Yet the SBC LECs would carve out their own "pick and choose" exception to the Eighth Circuit's holding simply because they do not want to provide other competitors with the same opportunities they have previously made available in their approved interconnection agreements. Given the Eighth Circuit's stated opposition to any deviation from the express terms of approved agreements in subsequent "opt-ins," the

¹⁰ Petition, at 33.

¹¹ Indeed, section 252(a)(1) makes clear that in the case of such negotiated agreements, the provisions set forth therein are to be reviewed "without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a)(1) (1996).

¹² *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753, 800-801, *cert. granted*, *AT&T Corp. v. Iowa Utils. Bd.*, 118 S.Ct. 879 (1998).

Commission should tread carefully in this area, and require the SBC LECs to provide the same contract terms to all requesting competitors.¹³

The SBC LECs also misapply the statutory "public interest" standards set forth in section 10 of the Act and section 706 of the 1996 Act. Although the deployment of advanced technologies may be in the public interest, effective and robust competition is as well, and the Commission's analysis should not focus upon the former to the exclusion of the latter. As noted above, those carriers who could provide or are already beginning to provide competitive alternatives to the SBC LECs will depend upon the bottleneck loop facilities of the incumbents to provide ADSL services to consumers. If the Commission grants the Petition and makes it more difficult for CLECs to obtain access to these ADSL loop facilities, the public interest will not be served, as consumers will have but one choice for ADSL service. Such a ruling could be particularly harsh for those CLECs who are already relying upon access to ADSL facilities to provide ADSL services to customers.

Apparently anticipating such arguments, the SBC LECs contend that granting them relief from unbundling and wholesale discount obligations "would also serve the public interest and the objective of section 706 by incenting *other carriers* to make investments in ADSL technology."¹⁴ This specious argument ignores entirely any concept of efficiency in the construction and deployment of network facilities. Indeed, similar arguments were made by incumbents and resoundingly rejected by this Commission in the context of discussing network element pricing in

¹³ Of course, KMC would not mind the SBC LECs' request so much if they were also willing to let CLECs choose which other provisions should or should not apply in different interconnection agreements.

¹⁴ Petition, at 27 (emphasis in original).

its *Local Competition Order*.¹⁵ What CLECs would face under the SBC LECs' proposal is a skewed "build (own facilities)" versus "buy (incumbent facilities or services)" dilemma. While facilities-based competition and the deployment of advanced technologies are desirable policies, they should not be achieved by forcing CLECs into inefficient "build" decisions. Forcing CLECs to build ADSL loop facilities to reach customers may be in many cases costly, wasteful, duplicative, and disruptive. Instead, in considering the public interest, the Commission should consider how to make sure that as many consumers can obtain access to ADSL services in an efficient and pro-competitive environment.

The SBC LECs' arguments about providing ADSL services to schools and libraries and underserved areas only confirms the need to make ADSL loop facilities available on an unbundled basis to competitors.¹⁶ By eliminating the unbundling requirements, the SBC LECs claim that they could better deploy ADSL services to schools and libraries and "areas not already served by existing ADSL providers." By eliminating the unbundling requirements, however, the SBC LECs would also deny the benefits of competition to schools and libraries and these underserved areas. Such a development would violate the spirit of establishing an explicit universal service mechanism, which allows all carriers who serve such customers or areas to be eligible for support for such service.

¹⁵ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15825 (1996) (stating that incumbent local exchange carriers generally argued that "if a new entrant can purchase the unbundled element from the incumbent LEC at a price no higher than the cost of the least-cost, most-efficient provider, then the new entrant has little incentive to invest in its own facilities.")

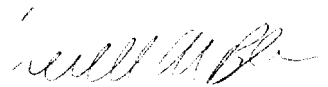
¹⁶ Petition, at 34.

Rather than providing incentives for additional carriers to compete for such customers and areas, the SBC LECs would have this Commission impose an additional barrier to entry.

IV. CONCLUSION

The SBC LECs' Petition seeks to promote their deployment of ADSL services at the expense of any competition for those services. Such action is in essence "robbing Peter to pay Paul" – promising consumers the benefits of advanced services while taking away the clear benefits of competition promised by the 1996 Act. As KMC stated in its Joint Comments in CC Docket Nos. 98-11, 98-26, and 98-32, this Commission "has taken action, in its universal service proceeding, to encourage the development and deployment of advanced telecommunications services to all Americans." In fact, the SBC LECs have failed to demonstrate that an exemption from sections 251(c)(3) and 252(i) of the Act will promote anything other than their own provision of ADSL services. The Commission should therefore deny their Petition.

Respectfully submitted,



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Dated: June 24, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June 1998, copies of the foregoing Opposition of KMC Telecom Inc. in CC Docket No. 98-91 were served by overnight delivery and hand delivery as indicated below:

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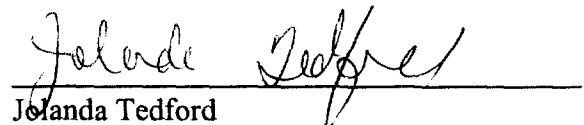
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